Section 401/Clean Water Act: U.S. Environmental Protection Agency Notice of Intention to Reconsider Final Rule Addressing Certification



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The United States Environmental Protection Agency ("EPA") published in the June 2nd Federal Register its Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule. See 86 Fed. Reg. 29541.

EPA states that the purpose of revising the Certification Rule is to strengthen the authority of states and tribes to protect water resources.

Section 401 of the Clean Water Act prohibits federal agencies from issuing permits or licenses that result in exceedance of water quality standards, or other applicable authorities, of the state. This provision of the Clean Water Act requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite to granting the permit or license.

If a state fails or refuses to act on a request for certification in a timely manner, the certification requirements are waived with respect to such federal application.

EPA described the Certification Rule issued in 2020 as establishing procedures that promote:

- Consistent implementation of Section 401 of the Clean Water Act
- Regulatory certainty in the federal licensing and permitting process

The 2020 Certification Rule was supported and opposed by different sets of states. Further, organizations such as the Association of Clean Water Administrators expressed concerns in comments on the proposed version of the 2020 Certification Rule. However, organizations such as the American Gas Association supported the 2020 Certification Rule.

EPA cites in the June 2nd Notice of Intent President Biden's Executive Order 13990 which is titled:

Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

In a Q&A document EPA states that the 2020 Certification Rule:

. . . after determining that, in key ways, it erodes state and tribal authority under the Clean Water Act and thereby clean water and public health protections. Through this process, EPA intends to support the role of states as co-regulators with the authority to protect their vital water resources and support

environmental, ecosystem, and public health in their states, as well as ensure that tribes are empowered in the circumstances that may affect their waters.

Subjects EPA intends to consider as outlined in the Notice of Intent include:

- Pre-filing meeting requests
- Certification request
- Reasonable period of time
- Scope of certification
- Certification actions and federal agency review
- Enforcement
- Modifications
- Neighboring jurisdictions
- Data and other information
- Implementation coordination

EPA states that it will conduct public and stakeholder outreach prior to proposing a new rule. However, in the meantime, the 2020 Certification Rule remains in effect.

A copy of the Federal Register Notice can be downloadedhere.